United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with Copy of affidavit of mailing

74-1760

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To be argued by
GARY A. WOODFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1760

P 15

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWARD PRAVATO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
GARY A. WOODFIELD,
Assistant United States Attorneys.
Of Counsel.

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Preliminary Statement

Edward Pravato appeals from a judgment of the United States District Court for the Eastern District of New York (Neaher, *J.*) entered May 31, 1974, convicting appellant, after a jury trial, of armed bank robbery.

Appellant, together with co-defendant Salvatore Polisi, was charged in a three count indictment with: (1) robbery of a federally insured bank (Count One), in violation of Title 18, United States Code, Section 2113(a); (2) use of a deadly weapon during the course of the commission of the bank robbery (Count Two), in violation of Title 18, United States Code, Section 2113(d); (3) and conspiracy to commit the robbery (Count Three) in violation of Title 18, United States Code, Section 371. After a jury trial,

appellant and co-defendant Polisi were found guilty on Counts One and Two.*

On May 31, 1974, appellant was sentenced to concurrent terms of twenty years imprisonment on Count One and Count Two, to run concurrently with a sentence appellant was then serving in a federal institution. Appellant is presently serving his sentence.

On appeal, appellant contends (1) that a piece of paper introduced into evidence at his trial was unlawfully seized; (2) that the Court improperly charged the jury concerning certain stipulations; (3) that the Court was without authority to sentence appellant to two sentences under Title 18, United States Code, Sections 2113(a) and 2113(d).

Statement of Facts

(1)

On May 3, 1971, the Franklin National Bank at 249-46 Horace Harding Boulevard, Queens, New York, was robbed of $25,135.12 by three individuals. Two of three individuals, appellant Pravato and co-defendant Polisi, were subsequently apprehended and were positively identified by bank employees at trial. According to eyewitness testimony, Polisi vaulted the teller's counter and filled a bag with money from Mrs. Barth's cash drawer. In doing so, Polisi activated a surveillance camera (289, 290). Thereafter, Pravato, armed with a handgun, approached Mrs. Barth and demanded more money from her cash drawer (291). Mrs. Barth opened another drawer allowing him to withdraw more money (291, 292), after which Pravato pointed his gun at the employees and ordered them to get down on the floor (294, 365, 381). The three robbers then fled the bank.

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* Prior to trial, Count Three of the indictment was dismissed upon motion by the Government.

At trial, Mrs. Barth, as well as Mrs. Callegari, a bank bookkeeper, and Mrs. Albert, another teller, each identified appellant as one of the men they had observed during the course of the bank robbery. Mrs. Barth was additionally able to make an in-court identification of Salvatore Polisi (294). These positive eye-witness identifications were corroborated by the introduction into evidence of numerous surveillance photographs depicting both defendants, and clearly showing a gun in the hand of appellant Pravato.

The Government also introduced a piece of paper seized from appellant's opened suitcase in a room of a house in Buffalo, New York shortly after his arrest on January 19, 1972. This piece of paper, which appellant acknowledged was his, contained the telephone number of Salvatore Polisi's father, Frank Polisi (493), and was introduced solely to establish a corroborative nexus between Pravato and Polisi.

Neither of the defendants took the witness stand, nor did they offer any evidence.

(2)

At a pre-trial suppression hearing, appellant moved to suppress the piece of paper found in his suitcase as the fruit of an illegal search. The evidence at the hearing disclosed that this paper was found in an opened suitcase on a bed in a room appellant had occupied in the single family dwelling of Mrs. Joan Syracuse, in Buffalo, New York (181). Access to this room was obtained by the consent of Mrs. Syracuse, who indicated to F.B.I. agents that she had allowed appellant to stay in a bedroom in her house for three days as a non-paying guest (179). Mrs. Syracuse escorted the agents to the bedroom and remained there during the search (180). In denying the motion to suppress, the District Court found that Mrs. Syracuse had authority to consent to a search of the bedroom on her premises (229-30).

ARGUMENT

POINT I

The search of appellant's room and suitcase was lawful.

Appellant initially contends that the seizure of evidence from a suitcase in his guest room in the home of Mrs. Syracuse was unlawful. Appellant insists that Mrs. Syracuse had no authority to consent to a search of appellant's suitcase located in that room.

It is generally accepted that where the right to occupancy by one person is equal or superior to that of another person, the consent of that party is sufficient to permit a lawful search. *United States* v. *Matlock*, — U.S. —, 94 S. Ct. 988, 992 (1974); see also *United States* v. *Jenkins*, 496 F.2d 57, 71-72 (2d Cir. 1974); *United States* v. *Ellis*, 461 F.2d 962, 967-68 (2d Cir. 1972); *United States* v. *Cataldo*, 433 F.2d 38 (2d Cir. 1970). In this case, that principle clearly sustains Mrs. Syracuse's authority to give lawful consent to a search of appellant's room. Appellant's occupancy did not oust Mrs. Syracuse from possession since appellant was merely a temporary non-paying guest. *Weaver* v. *Lane*, 382 F.2d 251 (7th Cir. 1967); *United States* v. *Novick*, 450 F.2d 1111 (9th Cir. 1971). Appellant acquired no rights in the property and remained there only at the sufferance of Mrs. Syracuse who could have requested him to leave at any time.

Conceding that Mrs. Syracuse may have had authority to consent to a search of the bedroom, appellant argues for the first time on appeal that she was without authority to consent to a search of appellant's open suitcase in that room. This argument lacks support. Numerous cases in-

volving consent searches have upheld the propriety of an incidental search of a non-consenting party's personal property. *See e.g., United States* v. *Matlock*, — U.S. —, 94 S. Ct. 988 (1974) (dresser drawers and diaper bag found in closet); *Frazier* v. *Cupp*, 394 U.S. 731 (1969) (duffel bag); *United States* v. *Robinson*, 479 F.2d 300 (7th Cir. 1973) (closet); *White* v. *United States*, 444 F.2d 724 (10th Cir. 1971) (closed zipper bag). The rationale for this holding is best set forth by the Seventh Circuit's decision in *United States* v. *Robinson, supra*, where the Court stated:

> The police might be deterred from employing consent searches altogether if they were required to ascertain the ownership or possession or custody of every article or space on the premises searched. The metaphysical subtleties would be endless and consent searches would be lost from the law enforcement arsenal.

479 F.2d at 303. *See also Fraizer* v. *Cupp., supra*, 394 U.S. at 740.

In the instant case, it is clear that appellant, having left his suitcase lying open on the bed in an open room, had no expectation of privacy. *Katz* v. *United States*, 389 U.S. 342, 351 (1967). The consensual search of the room and the seizure of evidence from the suitcase were therefore lawful.*

In any event, the admission of the paper seized from appellant's suitcase, if found to be error, would be harmless error beyond a reasonable doubt, *Chapman* v. *California*, 386 U.S. 18 (1967). The paper containing the phone num-

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* It should be noted that the piece of paper seized from the suitcase which contained the telephone number of co-defendant Polisi's father was of minimal importance in the Government's case against appellant since he had been identified by three bank employees in open court as well as depicted in numerous bank surveillance photographs.

ber of Polisi's father did not in any way connect the appellant to the bank robbery. Rather, it merely evidenced a nexus between the appellant, who was positively identified by three bank employees, and his co-defendant, Polisi, who was only identified by one eye-witness. While its introduction may have been damaging to defendant Polisi, it did not add to the Government's case against the appellant.

POINT II

There was no plain error in the Court's charge to the jury.

Although no exception was taken by defense counsel to any portion of the District Court's charge, appellant now urges that by reason of "plain error" alleged to exist in the District Court's charge, reversal of the judgment of conviction is required. Specifically, appellant contends that the District Court improperly removed from the jury's consideration an essential element of both counts of the indictment by reason of it's improper explanation of the stipulations entered into by the parties. The pertinent portion of the charge relied upon by appellant reads as follows:

> Now, in this case there appears to be no real dispute that the Franklin Bank was robbed on May 3, 1971. As I said before, its deposits were insured by the Federal Deposit Insurance Company. And it is also stipulated, as I understand it, that substantial sum, approximately $25,000 which was in the bank's care and custody, was taken from employees of the bank by the use of force, violence and intimidation, and that at least three employees were put in jeopardy when a dangerous weapon was used with respect to them (604).

Appellant argues that the stipulations entered into relate only to the jurisdictional element of the bank's

F.D.I.C. insurance, and the fact that approximately $25,000 had been taken in the robbery. He contends that the District Court's apparent expansion of these stipulations to include the taking by use of force, violence and intimidation removed these elements from the jury's consideration.

A reading of the charge (593-616) clearly indicates that the Court properly instructed the jury on the essential elements of the crimes charged and the burden of proof. Initially, the Court read the indictment and then the pertinent parts of the statute. Next, the Court enumerated the essential elements which the Government had the burden of proving beyond a reasonable doubt, stating in part:

> And four, that the persons who accomplished this taking—that is when I say persons here, that means these defendants on trial; this is an essential element the Government must prove beyond a reasonable doubt—now, that these defendants accomplished this taking, did so by force and violence or by intimidation (602).

The Court went on to state:

> In order to sustain the charge under the second count the Government in addition to the essential elements required to establish the crime of bank robbery under the first count must prove beyond a reasonable doubt as to each defendant an additional element: That is, that the defendants assaulted a person or put a person's life in jeopardy by the use of a dangerous weapon (602).

It is respectfully submitted that the Court's explanation cures any possible inadequacy contained in the questioned portion of the charge.

Moreover, the elements which appellant contends were removed from the jury's determination by the improper charge, that is, the force and assault used during the rob-

bery, were never contested during the course of the trial. Indeed, defense counsel in his summation readily conceded that force and assualt had occurred during the commission of the robbery (574). Focusing his defense on the issue of identification, defense counsel contended that the stress, terror and fright experienced by the bank employees had compromised their identification of appellant as a participant; stating in part:

> . . . so I would ask you to keep in mind under the circumstances of terror and fright and during the brief period of time that these witnesses were able to see what they could see there is the possibility, a great posibility that any identification that they made as a result of this incident in the bank could be incorrect (575).

Thus, in light of the decision of experienced defense counsel to pursue a trial tactic of conceding the force and assault committed during the robbery, and his failure to object or take exception to any portion of the charge, appellant's belated assertion of plain error is frivolous. *United States* v. *Hilbrich*, 341 F.2d 555 (7th Cir.), *cert. denied*, 381 U.S. 941, *reh. denied*, 382 U.S. 874 *reh. denied*, 384 U.S. 1028 (1965).

POINT III

Appellant was not prejudiced by the District Court's sentence.

The District Court imposed concurrent twenty year sentences for violations of § 2113(a) and § 2113(d). A more appropriate sentence in a multi-count case under the Federal Bank Robbery Act is a general sentence based on all the counts. *Gorman* v. *United States*, 456 F.2d 1258 (2d Cir. 1972); *United States* v. *Corson*, 449 F.2d 544 (3rd Cir. 1971).

Although the District Court's sentence did not fall within the guidelines set down in *Gorman, supra,* no apparent prejudicial effect was incurred by appellant in receiving concurrent sentences.* Moreover, this Court has held that where the sentencing Judge's intentions are clear, such a defect may be remedied without a remand which would "be needlessly time consuming and a meaningless act" *Gorman v. United States, supra,* 456 F.2d at 1260. Since the concurrent sentences in this case were twenty years on each count, compliance with *Gorman* would merely require a vacatur of the sentence on Count One.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL F. CORCORAN,
GARY A. WOODFIELD,
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Of Counsel.

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* Further, it should be noted that no motion pursuant to Rule 35, Federal Rules of Criminal Procedure, has been brought by appellant to correct the District Court's sentence.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being du

deposes and says that he is employed in the office of the United States Attorney for th

District of New York.

That on the 20th day of August 19 74 he served ~~a copy~~ TWO COPIES of the with

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by placing the same in a properly postpaid franked envelope addressed to:

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The Legal Aid Society
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drop for mailing in the United States Court House, Washington Street, Borough of Brookly

of Kings, City of New York.

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Sworn to before me this
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Sylvia E. Morris
SYLVIA E. MORRIS
Notary Public, State of New York
No. 24-4503861
Qualified in Kings County
Commission Expires March 30, 19 75

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